No. 83177-7
COA No. 61753-2-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Petitioner,

v.

S.J.W,

Defendant/Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 07-8-00180-4

PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Petitioner, State of Washington, respondent below, asks this Court to review the decision of the Court of Appeals referred to in section II.

II. COURT OF APPEALS DECISION

The State of Washington seeks review of the Court of Appeals published decision in *State v. S.J.W.*, (Slip Op. filed April 27, 2009). A copy of the decision is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

A. Did the juvenile court properly hold S.J.W. to his burden to show W.M.M. incompetent?

IV. STATEMENT OF THE CASE

A. Statement of procedural facts.

S.J.W. was charged with one count of rape in the third degree in Island County Superior Court, Juvenile Division. CP 81. He was subsequently convicted by the juvenile court. CP 26. The court imposed a manifest injustice disposition above the standard range. CP 27-30.

B. Statement of substantive facts.

For clarity, the statement of substantive facts is separated into the relevant court proceedings.

1. Competency Hearing.

The defense moved the juvenile court for an order declaring W.M.M. incompetent to testify because he is developmentally delayed. At the competency hearing, defense called four witnesses, Dr. Sidney Sparks, W.M.M.'s physician (2RP 5), Marjorie Forbes, supervisor with Department of Social and Health Services (2RP 19), W.M.M.'s father (2RP 26), and W.M.M.'s mother (2RP 33). W.M.M. was not called.

Dr. Sparks' testimony was allowed over objection by the State. 2RP 3. Dr. Sparks testified that her primary purpose in testifying was to comment upon the reliability of W.M.M.'s statements (2RP 15), that W.M.M. was able to answer direct questions (2RP 11), that W.M.M. can relate specific facts (2RP 16), and that her "best guess of his ability to talk about what happened to him is in [the four- to six-year-old] age group." 2RP 18.

The Department of Social and Health Services had previously objected in writing to the testimony of Marjorie Forbes, based on the failure to obtain releases to permit such testimony. The juvenile court granted the objection. 2RP 25.

Wayne Musha testified that W.M.M. is "not up to speed. . . ." 2RP 27. W.M.M. is 14. *Id.* In one instance, W.M.M.'s version of an incident "that happened in the park at night, or in the evening," was that the incident happened during the day in a parking lot. 2RP 29-30. W.M.M. was at a football game and said he was with certain people, but he was not. 2RP 30. W.M.M. told him a story of an airplane ride to Milwaukee that they didn't take. *Id.* W.M.M. couldn't tell a police officer his last name after a bike crash. *Id.* It "generally takes a while to get a true, accurate story out of [W.M.M.]. . . but you're still going to have to plug the holes yourself." 2RP 31-32. In court, W.M.M. would be focusing on something else, would be ignoring [the questioner] and would not focus on the question at hand. 2RP 32-33.

Elizabeth Musha testified that W.M.M. has a seizure disorder. 2RP 34. "The other day" he was able to tell her the baseball score but he told her the Mariners won (even though they lost) "because he wants them to win." *Id.* She testified to two instances when W.M.M. told falsehoods. 2RP 37-38. W.M.M. was unable to repeat something to a doctor immediately after being given the information by the doctor, but remembered it "perfectly" the next day. 2RP 40-41. W.M.M. cannot remember what he had for lunch. 2RP 41. Ms. Musha testified that "he's like any kid. Certain things stick out in their memory, like a ball game.

He doesn't usually give details." 2RP 42. She and her husband ask their son "simple, direct questions." *Id.* She testified that whether W.M.M. is able to answer accurately "depends what the question is." *Id.*

The juvenile court denied the motion disputing competency and stated, "there just has not been that finding by a preponderance of the evidence that the child is unable to recollect the events in question." 2RP 57. As well, the court stated that "[defense] has not met that preponderance of the evidence to show – to overcome the presumption -- . . . that the child is competent." 2RP 56.

2. Adjudicatory Hearing.

At the bench trial, the State called four witnesses, Wayne Musha (3RP 8), Officer Horn (3RP 31), W.M.M. (3RP 56), and Detective Seim (3RP 68).

Wayne Musha testified that S.J.W. was employed by him in the capacity of child sitter for W.M.M., once per week for at least two months. 3RP 9-10. Mr. Musha had arrived home from work at 5:50 on October 3, 2007, and S.J.W. and W.M.M. were in the house when he arrived, playing a videogame in W.M.M.'s room. 3RP 10-11. He heard S.J.W. leave the home, and very shortly thereafter, heard "flailing" in the bathroom. 3RP 12. W.M.M. was getting dressed, and he asked W.M.M. what he (the son) was doing, to which W.M.M. replied, "I'm getting dressed. Like Sam. . . .

He said that he was – he was doing just like Sam did, getting dressed in the bath – bathroom." 3RP 13-14. In response to the question, why was he getting dressed in the bathroom, W.M.M. said that S.J.W. stuck his pee-pee in his butt. 3RP 14. When asked by his father what he meant by that, W.M.M. repeated the same statement again. *Id.*

Mr. Musha elected to phone the police at 7:30 that evening, and Officer Horn responded at "7:45-ish." 3RP 15. Prior to his arrival, Officer Horn spoke with Mr. Musha and S.J.W. on the telephone. 3RP 16. Officer Horn spoke alone with S.J.W. and his mother, Ms. Garon, and then alone with W.M.M. and both his parents. 3RP 19-20. Neither parent took W.M.M. to the doctor. 3RP 30.

Officer Horn testified that he initially spoke with S.J.W. on the phone, and then met him at the Musha residence. 3RP 33. On the telephone, S.J.W. admitted to oral-genital and anal-genital intercourse with W.M.M.. 3RP 35. S.J.W. told the officer that he (S.J.W.) knew he could take advantage of W.M.M. because he was "retarded." 3RP 42. W.M.M. was able to tell Officer Horn that he knew why the officer was there – because S.J.W. made W.M.M. lick his penis. 3RP 45. And then he told the officer that S.J.W. "put his penis in my butt." *Id.* Those were W.M.M.'s exact words. *Id.* at 45-46. Officer Horn explained that he asked as few questions of W.M.M. as possible, conforming to standard

protocol, in order not "to lead him in any direction." 3RP 47. W.M.M. was able to tell Officer Horn that the "licking" happened and then he told S.J.W. he didn't want S.J.W. to continue, and then S.J.W. told W.M.M., "Just be quiet and do it." 3RP 54-55.

W.M.M. promised to tell the truth, told the court his name, spelled his last name correctly, gave the name of the street on which he lives, the name of the city in which he lives, the name of his school, his grade in school, his age, those persons (his parents) with whom he lives, and his parents' names. 3RP 57. He accurately identified S.J.W. by pointing, and was able to describe S.J.W.'s shirt as "blue." *Id.* He was able to remember when the police officer came to his house, who was there when the officer came, what color the officer's uniform was, the officer's name, and why the officer came to his house that day: "Because [S.J.W.] put his peanuts in my butt." 3RP 59-60. He was able to point to his groin to show where the "peanuts" were. 3RP 60.

W.M.M. was able to describe where this happened – in his room -- and that he told S.J.W., "Stop. Stop doing that." 3RP 60.

He was able to recognize defense counsel as "Debbie," (3RP 63) and it was defense counsel who indicated to him when he completed his testimony that his parents were right outside the door. 3RP 67.

Detective Seim testified that he was the detective assigned to the case, and that his initial steps were to review the case and to contact the Mushas. 3RP 69. He had been unable to contact Ms. Musha, so he contacted Child Protective Services, who assisted him in arranging an interview with W.M.M.. This interview was completed within two weeks of the event. 3RP 69-70. The detective explained that he had been trained in forensic child interviewing, and had performed about ten forensic child interviews. 3RP 74. His interview with W.M.M. lasted about 45 minutes 3RP 71. W.M.M. was able to answer questions about the specific allegations in a way that the detective was able to understand 3RP 73. W.M.M. was able to demonstrate that he could recall events that took place in the past. 3RP 72.

The defense called two witnesses, Mr. Musha and Ms. Musha. 3RP 81 and 83. Mr. Musha testified that he wrote a statement for the police. 3RP 81.

Ms. Musha testified she physically examined W.M.M.'s "behind" and found no sign of trauma, the skin was intact, there was no redness. 3RP 85. She testified that she has been a licensed practical nurse for ten years, that she did not know what a SANE nurse is, that she was unaware of what a forensic examination was, and that she thought a forensic examination had to do with a gun. 3RP 85 and 86. She testified that she

had no special training in examination of rape trauma victims. Further, she testified that she was unaware that physical evidence can be entirely absent even after sodomy. *Id.*

The juvenile court found S.J.W. guilty of rape in the third degree.

3. Disposition Hearing.

At the disposition hearing, the juvenile court found that two aggravating factors existed to support a manifest injustice sentence outside the standard range. First, the juvenile court found that W.M.M. was particularly vulnerable. Secondly, the juvenile court found that the crime was an abuse of trust.

V. REASONS WHY REVIEW SHOULD BE GRANTED

The Court of Appeals affirmed the trial court's disposition, and the finding of competency, but held that the burden was on the proponent to prove the witness was competent. Appendix A at 1-2.

First, the decision of the Court of Appeals is in conflict with the Washington State Supreme Court case of *State v. Smith*, 97 Wn. 2d 801, 650 .2d 201 (1982), wherein the court stated at page 803, "Where there has been no [adjudication of insanity], the burden is on the party opposing the witness to prove incompetence."

Second, the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court. This is so because the decision of the Court of Appeals has the effect of negating ER 601, that is by ruling that any witness under the age of 18 is no longer presumed competent. Also, no Washington case specifically addresses the question of which party has the burden of persuasion concerning competency of a child witness over the age of 10 since RCW 5.60.050(2) was amended to eliminate the age requirement of that statute.

VI. ARGUMENT

A. The Juvenile Court did not err when it held that S.J.W. had the burden to show by a preponderance that W.M.M. was incompetent to testify.

It is for the trial court to determine competency, *State v. Froelich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981), and the fact-finder to determine credibility. *State v. Moorison*, 43 Wn.2d 23, 34, 259 P.2d 1105 (1953).

"A witness of any age is presumed competent absent a determination by the court that the witness is incompetent." *State v. C.M.B.*, 130 Wn. App. 841, 843, 125 P.3d 211 (2005). In Washington, there no longer is a statute that defines a specific age at which witnesses are presumed competent; rather, the statute "treat[s] all 'persons' the same

for purposes of competency." *Id.* at 844. A person adjudicated insane is presumed incompetent to testify, and that presumption may be rebutted by the party offering the witness. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982). "Where there has been no such adjudication, the burden is on the party opposing the witness to prove incompetence." *Id.* Therefore, because any witness, under CrR 6.13(c) and ER 601, is presumed competent, the burden to show incompetence is properly on the party opposing the witness.

S.J.W. argues that *Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998) stands for the proposition that, where the witness is a child, the burden somehow shifts to the proponent to show competency. That proposition appears nowhere in that court opinion. In fact, no other court opinion in this state supports that claim.

Professor Tegland makes the same assertion in Courtroom Handbook on Washington Evidence (Karl B. Tegland, Courtroom Handbook on Washington Evidence, (2008-2009 ed. 2008)) at page 297, citing *State v. Karpenski*, 94 Wn.App. 80, 971 P.2d 553 (1999) abrogated by *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). That proposition appears nowhere in that court opinion. That court opinion simply does not stand for the proposition that the burden of showing competence shifts to the proponent of a child witness.

Tegland goes on to explain, "Normally the party calling the child as a witness will take the leading role in establishing the child's competency to testify." *Id.* Presumably, this is because it is the State who is required to comply with RCW 9A.44.120 before child hearsay statements can be introduced at trial, and some of the issues with child competency are similar to issues with child hearsay.

The Court of Appeals specifically cited Tegland, as well as Seth A. Fine, Washington Practice: Criminal Law § 2413, at 19 (Supp. 2008-2009) for the proposition that, "If there is a challenge, a party who offers a child's testimony must establish the child's competency by a preponderance of the evidence." But this proposition has never been the holding of a case in Washington, and is in direct conflict with *State v. Smith*, supra.

The Court of Appeals makes an unjustifiable distinction between developmentally delayed witnesses who are under and over the age of 18. Under the authority of that opinion, a 17-year-old witness who operates to some degree as a 6-year-old is presumed incompetent. On the other hand, an 18-year-old witness who operates to some degree as a 6-year-old is presumed competent. There is neither legal authority nor public policy support for that distinction.

The Court of Appeals also cited *State v. Wyse*, 71 Wn.2d 434, 437, 429 P.2d 121 (1967), a case in which the *Allen* factors were applied to a 14-year-old mentally disabled child. The State does not argue that the *Allen* factors should not be used to determine competency of a child witness. Rather, the State asserts that, where the child witness is objected to by the defense on the grounds of competency, the defense is the party that carries the burden of persuading the court that the presumption of competency has been overcome by a preponderance of the evidence.

The next question, then, is whether S.J.W. had proved by a preponderance of the evidence that W.M.M. was not competent to testify.

B. The Juvenile Court did not abuse its discretion in finding that S.J.W. failed to show by a preponderance of the evidence that W.M.M. was not competent to testify.

In *State v. Woods*, 154 Wn.2d 613, 114 P3d. 1174 (2005), the Washington Supreme Court succinctly outlined the law surrounding competency of a witness:

> The determination of competency is within the sound discretion of the trial court, and it will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion. There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness. The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence.

Id. at 617, citations omitted.

S.J.W. chose not to call W.M.M. at the competency hearing, so the juvenile court properly found that S.J.W. had not carried his burden to show W.M.M. incompetent because there was nothing in the record about the witness's recollection of the events. As well, the court, because of the absence of W.M.M., could not "[see] the witness, [notice] the witness's manner, and [consider] his . . . capacity and intelligence" to ascertain that the presumed-competent witness was in fact not competent.

However, the juvenile court was able to "[see] the witness, [notice] the witness's manner, and [consider] his . . . capacity and intelligence" at the bench trial. The Court of Appeals, also, benefitted from a review of the witness's testimony at trial. "On appeal, [the appellate court] may examine the entire record in reviewing a competency determination." *Woods* at 617, citing *State v. Avila*, 78 Wn.App. 731, 737, 899 P.2d 11 (1995). A review of that record by the Court of Appeals showed that W.M.M. met the requirements set forth in *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967). Appendix A at p. 2.

S.J.W. argued to the Court of Appeals that the juvenile court abused its discretion by declining to consider evidence of memory taint at the competency hearing (Brief of S.J.W. at 21), and cites to *A.E.P.*, 135 Wn.2d at 230. S.J.W. is mistaken. That portion of the opinion that S.J.W.

relies on is concerned with the reliability of a young child's hearsay statements to others and whether those hearsay statements should be allowed in evidence. Indeed, in *A.E.P.,* "[a]t oral argument Petitioner's counsel conceded his challenge of memory taint more strongly focuses on the admissibility of A.E.P.'s hearsay statement, rather than on her competency to testify." *Id.* at 222.

In S.J.W.'s case, child hearsay statements were not admissible because, whether competent or not, whether disabled or not, the witness was older than ten years of age, so "taint" was not an issue at the competency hearing. Any "taint" would go to credibility and not to competency. *Id.*

VII. CONCLUSION

The Court of Appeals' decision, which shifts the burden of persuasion entirely to the State to show competency of any child witness, is in direct conflict with Evidence Rule 601 and *State v. Smith*, supra. This Court should accept review.

Respectfully submitted this 26th day of May 2009.

GREGORY M. BANKS
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61753-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
S.J.W.,	)	PUBLISHED OPINION
	)	
Appellant.	)	
	)	FILED: April 27, 2009

LEACH, J. — S.J.W. appeals his conviction for third degree rape. He contends that the juvenile court erred in ruling that the victim, W.M., who was 14 years old at the time of trial, was competent to testify under State v. Allen[1] and in failing to strike W.M.'s trial testimony due to its inconsistencies. S.J.W. also claims that the court erred when it admitted statements he made to a police officer, arguing that they were made during a custodial interrogation and required Miranda[2] warnings. We hold that, under Allen, the court erred in placing the

[1] 70 Wn.2d 690, 424 P.2d 1021 (1967). In determining the competency of a mentally disabled 14-year-old, the test set forth in Allen applies. See State v. Wyse, 71 Wn.2d 434, 437, 429 P.2d 121 (1967) (applying Allen test to a 14-year-old mentally disabled female, alleged by the defendant to have a mental age less than 10 years old).

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

burden on S.J.W. to prove that W.M. was incompetent to testify. But this error does not warrant reversal because our review of W.M.'s trial testimony shows that he satisfied the requirements set forth in Allen. The court also acted within its discretion when it did not to strike W.M.'s trial testimony. Finally, the court properly admitted statements made by S.J.W during a noncustodial interview at W.M.'s house, in his mother's presence. Accordingly, we affirm.

Background

W.M. is developmentally delayed due to a seizure disorder and requires constant supervision. From about September 2007 until the beginning of November 2007, W.M.'s parents paid S.J.W., who was a neighbor and friend of W.M., to watch him once a week. At the time of the incident, both were 14 years old.

On October 3, 2007, S.J.W. watched W.M. for about 45 minutes until W.M.'s father returned from work about 5:50 p.m. W.M.'s father heard S.J.W. leaving the house and found his son in the bathroom dressing himself. When asked by his father what he was doing, W.M. replied, "I'm getting dressed. Like [S.J.W.]." Then he told his father S.J.W. had "stuck his pee-pee in his butt." W.M. repeated this when his father asked him a second time.

After receiving a call from W.M.'s father, S.J.W.'s mother returned with S.J.W. to W.M.'s house around 6:15 p.m. W.M.'s father phoned the police and spoke with Officer Patrick Horn. Horn also spoke with S.J.W. over the phone, and according to Horn, S.J.W. admitted having sexual contact with W.M. When

Horn arrived at the house, W.M.'s father stated that he wanted to file a report but not do "anything further." Horn then asked to speak with S.J.W. and his mother privately, and W.M.'s father showed them to the master bedroom. S.J.W.'s mother closed the door, and she and Horn stood a few feet from S.J.W., who sat on the bed.

Horn testified that he read S.J.W. his Miranda rights before questioning him. But W.M.'s father and S.J.W.'s mother testified that Horn advised S.J.W. of his Miranda rights after questioning him, and the court found their testimony credible. At the interview, S.J.W. chose not to answer some of Horn's questions, but he admitted having oral and anal intercourse with W.M. He also told Horn that he "knew he could take advantage of [W.M.] because he was retarded." Later in the interview, S.J.W.'s mother became upset so she opened the door and asked W.M.'s father to come inside. W.M.'s father remained in the room. Towards the end of the interview, Horn stated he was not taking S.J.W. into custody and asked him to make a written statement. S.J.W.'s mother refused to allow Horn to obtain a written statement and terminated the interview.

Horn next interviewed W.M. and both of his parents in the bedroom.[3] Horn testified that he asked as few questions as possible to avoid "lead[ing] [W.M.] in any direction." W.M. told Horn that S.J.W. "made me lick his penis" and then directed him to lie down on the bed. When W.M. said he did not want to

[3] W.M.'s mother arrived at the house during Horn's interview with S.J.W.

continue, S.J.W. responded, "Just be quiet and do it." W.M. said S.J.W. then "put his penis in my butt."

At the CrR 3.5 confession hearing on May 2, 2008, the court ruled that Horn's interview with S.J.W. was noncustodial based on the following facts: (1) S.J.W. was in a private residence; (2) S.J.W. did not answer some of Horn's questions; (3) S.J.W.'s mother was present during the interview; (4) S.J.W.'s mother shut the bedroom door at the start of the interview and later opened the door to call W.M.'s father into the room when she became upset; (5) W.M.'s father remained in the room; and (6) S.J.W.'s mother terminated the interview when Horn attempted to obtain a written statement. The court concluded that S.J.W.'s statements at the interview were voluntary and admissible.

At the competency hearing on May 6, 2008, S.J.W. called Dr. Sidney Sparks, W.M.'s pediatrician. On direct examination, Sparks was asked, "[W]hen you question a child, is there a particular manner in which you go about it?" The State objected, and the court sustained, stating that it was "not so concerned about how [W.M.] was questioned." Sparks then described W.M.'s abilities, opining that he functioned at a mental level comparable to a four to six-year-old. She testified that W.M. was able to answer direct questions but "can often be found to change his mind depending on how the question is asked." When asked about W.M.'s ability to tell the difference between truth and falsity, Sparks answered:

> I don't know that I've ever specifically thought about whether he knows the difference between true and not true. I have thought

> about whether he is able to relate to me all the pieces of information I need and whether I can trust the ones he gives. Particularly in regard to time, he has difficulty.

W.M.'s father also testified that it "takes a while to get a true, accurate story out of [W.M.]." For example, he stated that his son once said that they had been at a park in the evening when, in reality, they had been there in the morning. Another time, W.M. talked about an airplane trip to Milwaukee that they had never taken. Similarly, after a football game, W.M. told his father that certain people had been there when they had not. W.M.'s father did not specify when these events occurred.

W.M.'s mother provided other examples in her testimony. She related how W.M. had been able to remember a baseball score but inaccurately reported that the Mariners won "because he wants them to win." She also described how W.M. often does not remember what he ate for lunch. On another occasion, W.M. was unable to repeat information to a doctor immediately after it was given to him. Although he remembered the information "perfectly" the next day, he could not recall it after that day. W.M.'s mother did not specify when these events occurred.

The State did not call any witnesses, and the trial court did not examine W.M. Based on the evidence presented, the court found W.M. competent. The court first explained that in applying the Allen test, the burden to demonstrate W.M.'s incompetency rested on S.J.W. "When a child is over 14, there is a presumption that that child is competent. So there has to be the burden on the

person who is saying that person is not competent to show by a preponderance of the evidence." The court concluded that S.J.W. had failed to meet this burden:

> [T]he types of issues you're bringing up go to the credibility of this particular witness. . . .
>
> But I've not heard anything about the "events in question." I've heard about lunches. I've heard about a Mariners game. I heard about some other situations which are, you know, troubling. And I think will be troubling to a jury. But not necessarily about the events in question. And that's what I have to look at.
>
> As long as the child is able to demonstrate an independent recollection of the events in question and has the ability to describe them, then the child's equivocal or inability to recall details or to recall other things goes to the weight of the testimony.
>
> . . . .There just has not been that finding by a preponderance of the evidence that the child is unable to recollect the events in question.

At the bench trial on the next day, the State called W.M. W.M. testified that Horn had come to his house "because [S.J.W.] put his peanuts in my butt." When asked to clarify what he meant by "peanuts," W.M. pointed to his groin. The prosecutor then asked W.M. whether he consented to having sexual intercourse with S.J.W.

> Q: What did you tell [S.J.W.]?
> A: Stop. Stop doing that.
> Q: Why did you tell him to stop doing that?
> A: Because he was doing something to me.
> Q: Did you want him to do that?
> A: No.

After intercourse, W.M. said, "I cried." But W.M. gave inconsistent answers when asked if he had performed oral intercourse on S.J.W. He also said that when he told S.J.W. to stop, he was playing video games. Later, he said he was playing basketball.

Additional witnesses called by the State included W.M.'s father, Horn, and Carl Seim, a police detective who investigated the case. W.M.'s father and Horn related their version of events as described above. Seim testified that W.M. was able to answer questions and recall past events based on his interview with W.M. S.J.W. called both of W.M.'s parents. W.M.'s father testified about writing a statement for the police. W.M.'s mother testified that she did not find any signs of physical trauma when she examined her son, but she conceded that she had no training with handling rape victims.

The court found S.J.W. guilty of third degree rape under RCW 9A.44.060(1)(a).[4] In its oral ruling, the court stated that sexual intercourse had occurred, S.J.W. and W.M. were not married, and W.M. "clearly expressed his lack of consent by saying, 'Stop. Stop doing that.' The fact that [W.M.] then followed [S.J.W.'s] directions to 'Lie down on the bed and do it anyway' is not conduct that indicates freely given agreement to have sexual intercourse." At the dispositional hearing on May 21, 2008, the court decided that two aggravating

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[4] RCW 9A.44.060(1)(a) provides the elements of third degree rape:

> (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:
>
> (a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

RCW 9A.44.010(7) states that consent means that "at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."

factors existed to support a manifest injustice sentence outside the standard range: W.M. was particularly vulnerable and the crime was an abuse of trust. S.J.W. was sentenced to 39 to 52 weeks commitment.

Discussion

I. Competency Determination

S.J.W. contests the court's competency ruling on grounds that it erred in placing the burden on him to establish W.M.'s incompetency. He argues that when the competency of a child witness is challenged, the burden of proving the child's competency rests on the party calling the witness.

In Washington, "[t]he competency of a child witness is presumed by statute."[5] Under RCW 5.60.020, "[e]very person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding."[6] RCW 5.60.050 provides an exception to this general rule of competency:

> The following persons shall not be competent to testify:
>
> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

[5] State v. C.M.B., 130 Wn. App. 841, 843, 125 P.3d 211 (2005).

[6] ER 601 similarly states that "[e]very person is competent to be a witness except as otherwise provided by statute or by court rule."

> (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.[7]

When the competency of a child witness is challenged, the trial court applies the test for determining child competency set forth in Allen. Under this test, the child must demonstrate:

> (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it.[8]

Determining the child's ability to meet these five Allen factors rests primarily with the trial judge, who must find that all five factors are met before the child can be declared competent.[9] While analysis of the Allen factors should be addressed on the record, the failure to enter written findings does not preclude review or require reversal when the record is sufficient for this court to independently

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[7] CrR 6.12(c) similarly provides:

> The following persons are incompetent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly.

[8] State v. C.J., 148 Wn.2d 672, 682, 63 P.3d 765 (2003) (citing State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990)).

[9] In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998); State v. Sardinia, 42 Wn. App. 533, 536, 713 P.2d 122 (1986).

assess whether the factors have been met.[10] A trial court's competency ruling is reviewed for an abuse of discretion.[11]

Consistent with the framework discussed above, when the competency of a child witness is challenged, the burden of proving the child's competency rests on the party calling the child.[12] For example, in In re Dependency of A.E.P.,[13] the trial court questioned five-year-old A.E.P. about allegations of sexual abuse by her father, and she supplied details about incidents involving the alleged touching.[14] But the court never asked A.E.P. when these incidents had occurred.[15] Nonetheless, the court found that A.E.P. was competent to testify and concluded that A.E.P. had been abused by her father.[16] On appeal, our Supreme Court reversed. The court emphasized that A.E.P. was asked only

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[10] State v. Avila, 78 Wn. App. 731, 735-36, 899 P.2d 11 (1995).

[11] State v. Karpenski, 94 Wn. App. 80, 101-02, 971 P.2d 553 (1999), abrogated on other grounds by C.J., 148 Wn.2d 672. Although the trial court did not examine W.M. at the competency hearing, it considered the testimony of defense witnesses in determining W.M.'s competency. The abuse of discretion standard is appropriate since the trial court's information is superior to the appellate court's. See Karpenski, 94 Wn. App. at 105.

[12] See also 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 601.6, at 299 (5th ed. 2007) ("The court has no obligation to determine the child's competency unless the child's competency is challenged. If the child's competency is challenged, however, the burden shifts to the proponent to establish the child's competence by a preponderance of the evidence."); 13B SETH A. FINE, WASHINGTON PRACTICE: CRIMINAL LAW § 2413, at 19 (Supp. 2008-2009) ("The court is not required to hold a competency hearing absent any challenge to a witness's competency. If there is a challenge, a party who offers a child's testimony must establish the child's competency by a preponderance of the evidence.").

[13] 135 Wn.2d 208, 956 P.2d 297 (1998).

[14] A.E.P., 135 Wn.2d at 221.

[15] A.E.P., 135 Wn.2d at 221.

[16] A.E.P., 135 Wn.2d at 221.

once on cross-examination when the abuse occurred and she "was unable to fix any particular point in time when the alleged touching occurred."[17] The court also pointed out that there was "simply no information in the record which helps narrow the time window of when the event occurred."[18] As a result, the court concluded that "A.E.P.'s competence to testify was not properly established, due to the absence of the critical information regarding when the alleged abuse occurred."[19] In particular, the court held that the second Allen factor had not been met, reasoning that the trial court "cannot possibly rule on a child's 'mental capacity at the time of the occurrence . . . , to receive an accurate impression of it' when the court has never determined when in the past the alleged events occurred."[20] Thus, A.E.P. teaches that the Allen factors must be supported by affirmative evidence and that the failure of the party calling the child witness to carry its burden of presenting critical information results in a finding of incompetency.[21]

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[17] A.E.P., 135 Wn.2d at 224.
[18] A.E.P., 135 Wn.2d at 225.
[19] A.E.P., 135 Wn.2d at 234.
[20] A.E.P., 135 Wn.2d at 225 (quoting Allen, 70 Wn.2d at 692).
[21] See also Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 100-03, 713 P.2d 79 (1986) (reversing trial court's competency determination based solely on the child's deposition when the third Allen factor had not been met).

Similarly, in State v. Karpenski,[22] the trial court found that seven-year-old Z was competent to testify, even though at the competency hearing, Z vividly portrayed how he and his younger brother had been born at the same time.[23] In deciding whether the trial court abused its discretion, Division Two described the nature of a trial judge's discretion in handling competency questions. "[W]hen a trial judge addresses a competency-related question of preliminary fact, he or she has discretion to inquire whether the evidence preponderates in favor of that fact."[24] The court explained that the judge "'select[s] which portions [of evidence] have the greater persuasive value'" and decides whether those portions weigh in favor of competency.[25] Accordingly, when the Karpenski court applied the Allen test, it framed the issue as the following question: "[C]ould a trial judge reasonably find it to be more likely true than not true that Z was capable of distinguishing truth from falsity?"[26] Based on Z's incoherent testimony, the court answered this question in the negative, declaring that "the evidence is insufficient

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[22] 94 Wn. App. 80, 971 P.2d 553. Fine also cites Karpenski as standing for the proposition that the party calling the child witness must establish the child's competency by a preponderance of the evidence. 13B FINE, at 19 (Supp. 2008-2009).

[23] Karpenski, 94 Wn. App. at 106.

[24] Karpenski, 94 Wn. App. at 103-04.

[25] Karpenski, 94 Wn. App. at 103 (quoting State v. Borland, 57 Wn. App. 7, 10-11, 786 P.2d 810 (1990)).

[26] Karpenski, 94 Wn. App. at 105-106.

to support a finding that Z was capable of distinguishing truth from falsity."[27] Thus, Karpenski establishes that the trial judge's function is to decide whether the evidence preponderates in favor of competency, with the burden resting on the party calling the child witness to present evidence that demonstrates competency.

The State asserts that the burden rests on the party opposing the child witness, relying on State v. Smith.[28] There, the court held, "[W]here a person has been adjudicated insane, a presumption of incompetency arises, rebuttable by the person offering the witness. Where there has been no such adjudication, the burden is on the party opposing the witness to prove incompetence."[29] But Smith concerns challenges to an adult witness's competency under the "unsound mind" exception in RCW 5.60.050(1).[30] Since S.J.W. does not challenge W.M.'s competency under that exception, Smith does not apply here. Thus, the court erred in placing the burden on S.J.W. to prove W.M.'s incompetency.

This error, however, does not warrant reversal in this case. "Although a trial court determines competence pretrial, on appeal we will examine the entire record to review that determination."[31] Here, W.M.'s trial testimony shows that he met all five Allen factors. W.M. responded affirmatively when asked by the

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[27] Karpenski, 94 Wn. App. at 106.
[28] 97 Wn.2d 801, 650 P.2d 201 (1982).
[29] Smith, 97 Wn.2d at 803.
[30] Smith, 97 Wn.2d at 803.
[31] State v. Avila, 78 Wn. App. at 737; State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

prosecutor whether he promised to tell the truth, satisfying the first factor, an understanding of the obligation to speak the truth on the witness stand.[32] W.M.'s initial report to Officer Horn and his specific recollections about the incident eight months later at trial demonstrated that he had the mental capacity at the time of the incident to receive an accurate impression of it, satisfying the second factor.[33] For example, W.M. was able to specifically recall that on the day of the incident, Officer Horn arrived at his house after school to ask him questions about the alleged rape. W.M. also remembered that his father, S.J.W., and S.J.W.'s mother were at the house when Horn arrived. In addition to this testimony, the trial court was able to observe W.M.'s overall demeanor and manner and infer that the second factor was met.[34] W.M.'s recollections of the incident also satisfy the third factor, a memory sufficient to retain an independent recollection of the occurrence. W.M. testified consistently that anal intercourse occurred and that he told S.J.W. to stop. Finally, W.M.'s answers to the prosecutor's questions showed that he had the capacity to express his memories of the incident and to understand questions about it, thus meeting the fourth and fifth Allen factors.

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[32] See Avila, 78 Wn. App. at 736 (ruling that first Allen factor was met when five-year-old responded affirmatively when asked if she understood the importance of telling the truth to the judge).

[33] See Woods, 154 Wn.2d at 622 (stating that testimony about events contemporaneous with the nine-month period during which the abuse could have occurred was evidence supporting the second Allen factor).

[34] See Sardinia, 42 Wn. App. at 537 (holding that a nine-year-old's overall demeanor and the manner of her answers were sufficient to permit the trial court to infer that the second Allen factor was met).

S.J.W. points to inconsistencies in W.M.'s testimony regarding oral intercourse and other details. According to S.J.W., these inconsistencies revealed W.M.'s incompetency at trial and required the court to strike his testimony. But these inconsistencies in W.M.'s testimony go only to his credibility, not to admissibility.[35] W.M. also consistently reported and later testified that S.J.W. had anal intercourse with him and that he did not give S.J.W. consent. The trial court did not abuse its discretion when it admitted and did not strike W.M.'s testimony.[36]

In upholding the trial court's competency ruling, we also reject S.J.W's contention that the court erred in failing to consider evidence of memory taint.[37] The only evidence on this point consists of allegations that Horn used suggestive and leading questions.[38] But this evidence does not show that W.M. was rendered incapable of testifying accurately at trial about the incident. Nor does it demonstrate that Horn's questioning rises to the level of the improper interview techniques described by Division Three in State v. Carol M.D.,[39] which include

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[35] See State v. Stange, 53 Wn. App. 638, 641-42, 769 P.2d 873 (1989).

[36] See State v. Moorison, 43 Wn.2d 23, 33, 259 P.2d 1105 (1953) (holding that a trial court "could" strike a defendant's testimony if the court is "convinced" that it mistakenly ruled on the defendant's competency). We further note that the record contains no evidence that S.J.W. moved to strike W.M.'s testimony at trial.

[37] See A.E.P., 135 Wn.2d at 230 (stating that evidence of memory taint may be considered at the competency hearing and negate a finding under the third Allen factor).

[38] W.M.'s father and mother provided affidavits stating that Horn asked leading questions regarding consent and introduced concepts of being hurt by the intercourse.

[39] 97 Wn. App 355, 357-58, 983 P.2d 1165 (1999).

using threats and bribes, asking repetitive and persistent leading questions, and holding multiple and extended interviews.[40] Indeed, at trial S.J.W. conceded the accuracy of most of W.M.'s testimony and controverted the inference to be drawn from the fact W.M. followed S.J.W.'s direction after telling S.J.W., "Stop. Stop doing that." Therefore, any error the court may have committed in failing to consider additional evidence of memory taint is harmless.

In sum, the court erred in holding that S.J.W. carried the burden of proving W.M. was incompetent to testify. This error, however, does not require reversal because W.M.'s trial testimony shows that he was competent under the five Allen factors.

II. Noncustodial Interrogation

S.J.W. argues that the court erred in admitting statements he made to Horn because they were made during a custodial interrogation and required Miranda warnings.

Under the federal and state constitution, a juvenile possesses rights against self-incrimination.[41] Miranda warnings protect these rights when a defendant is in police custody.[42] But outside the context of custodial interrogation, Miranda does not apply.[43] Our courts determine whether an

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[40] Carol M.D., 97 Wn. App. at 357-58.

[41] U.S. CONST. amend. V; WASH. CONST. art. 1, § 9. See RCW 13.40.140(8).

[42] State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (citing State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986)).

[43] Roberts v. United States, 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980).

interrogation is custodial using an objective standard, which is "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest."[44] A trial court's custodial determination is reviewed de novo.[45]

S.J.W. contends that the interview was custodial because no reasonable person would have believed he was free to leave under the circumstances. Relying on State v. D.R.,[46] S.J.W. points out that Horn did not tell him that he could leave or refuse to answer questions. Horn also stood in front of the doorway and frequently rested his hand on the butt of his gun.

But D.R. is distinguishable. In that case, a detective interviewed 14-year-old D.R. regarding allegations of incest with his sister.[47] The interview was conducted in the assistant principal's office, with the assistant principal and a social worker present.[48] While the detective did not give D.R. Miranda warnings, he told D.R. he did not have to answer questions.[49] During the interview, the detective asked leading questions and made accusatory statements such as, "'[w]e know you've been havin' [sic] sexual intercourse with your sister'" and "'[w]e know already because [your sister] told us.'"[50] On appeal, Division Three

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[44] Lorenz, 152 Wn.2d at 36-37 (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

[45] Lorenz, 152 Wn.2d at 36 (citing State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

[46] 84 Wn. App. 832, 930 P.2d 350 (1997).

[47] D.R., 84 Wn. App. at 833-34.

[48] D.R., 84 Wn. App. at 834.

[49] D.R., 84 Wn. App. at 834.

[50] D.R., 84 Wn. App. at 834.

held that the interrogation was custodial due to the detective's "failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation."[51]

Although S.J.W. was not told he could leave, unlike the "naturally coercive setting" in D.R., the interview here took place in a private residence familiar to S.J.W. In addition, S.J.W.'s mother was present. Significantly, she called W.M.'s father into the room when she became upset, and she terminated the interview when Horn attempted to obtain a written statement. While Horn did not tell S.J.W. that he could refuse to answer his questions, S.J.W. chose not to answer some of Horn's questions. Finally, unlike the interrogation in D.R., Horn's interview was not "obviously accusatory" in nature. Under these circumstances, we conclude that the interview was noncustodial for the purposes of Miranda and that S.J.W.'s statements were admissible.

Conclusion

In applying the Allen test for child competency, the trial court erred in placing the burden on S.J.W. to show W.M.'s incompetency. But this error does not require reversal because an independent review of W.M.'s trial testimony establishes that all five Allen factors were satisfied. The court also acted within its discretion when it did not strike W.M.'s testimony, and it properly admitted

[51] D.R., 84 Wn. App. at 838.

statements made by S.J.W. during a noncustodial interview. S.J.W.'s third degree rape conviction is affirmed.

Leach, J.

WE CONCUR:

Ann, J.

Agid, J.